NO. 86-779

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

EMIL F. DeLORETO and
JAMES M. DeLORETO,

Petitioners,

-vs-

CITY OF SANTA BARBARA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL, STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

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QUESTIONS PRESENTED

1. When this Court, having declared a state law unconstitutional in part, sends that case back for state determination of whether the objectionable portion of the law is severable, thus permitting the judgment or conviction of violating valid provisions of that law to stand, is such severence, and the determination whether it is permissible, a judicial or a legislative function?

2. If the judiciary of that state rules that such severance is not possible, and the legislature then reenacts that and similar laws, omitting the vitiating provisions, can a prior prosecution for violation of unobjectionable provisions of those laws then be continued?

3. Is due process of law accorded when litigants are deemed to have "waived," by failing to timely apprise the court of, substantive law expressly designed to protect them for such prosecution?

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IN THE

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October Term, 1986

EMIL F. DeLORETO and
JAMES M. DeLORETO,

Petitioners,

-vs-

CITY OF SANTA BARBARA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL, STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

Petitioners respectfully pray that a writ of certiorari issue to review the opinion of the Court of Appeal of the State of California for the Second Appellate District, Division Six.

OPINION BELOW

The unpublished opinion of the Court of Appeal appears in the Appendix, together with orders denying rehearing and review.

JURISDICTION

The opinion of the Court of Appeal was filed April 3, 1986. A timely petition for rehearing was denied May 1, 1986. A timely petition for review by the California Supreme Court was denied July 9, 1986. This Court has jurisdiction under 28 U.S.C. §1257(3).

ENACTMENTS INVOLVED

Constitution of the United States:

Fourteenth Amendment (Due Process Clause)

California Business and Professions Code:

> §5499. No city or county shall require the removal of any on-premises advertising display on the basis of its height if special topographic circumstances would result in material impairment of visability of the sign [or effective communication with the public] by conformance with any ordinance . . . adopted after March 12, 1983.

Santa Barbara Ordinance 4259, adopted 3/20/84:

> §22.70.080. Non-conforming Signs.
>
> C. Removal.
>
> 1. A sign which does not conform to the provisions of this Chapter, but which legally existed and was maintained on January 1, 1976 ... shall be removed ... within one hundred eighty (180) days after written notice from the Community Development Department.

STATEMENT OF THE CASE

Petitioners own a shopping center in Santa Barbara, California. For over 25 years they have maintained various commercial signs on the premises.

Commencing in 1975 the City adopted ordinances prohibiting such signs and establishing a procedure for removing them. In 1982 the City filed this action, alleging compliance with the abatement procedure required by the ordinance then in effect, and seeking an order

for the removal of certain signs at the center.

On the City's motion for summary judgment, the court ruled that the ordinance was constitutionally invalid for overbreadth under the holding of this Court in Metromedia, Inc. v. City of San Diego (1981) 101 S Ct 2882.[1/]

In 1984 the City adopted a new ordinance meeting the standards set by Metromedia, and renewed its motion for summary relief. It attached a copy of the new ordinance to its moving papers, but did not allege post-adoption compliance with the abatement procedure spelled out therein.

At the hearing on that motion, the court refused to consider certain state laws which prohibit such abatement, ruling that the petitioners had not cited those statutes in a timely manner, and ordered the removal of the large sign identifying/advertising the center.

1/ That case was remanded to California for determination of whether portions of the ordinance might be separately salvageable. The California Supreme Court concluded that they were not. 32 Cal.3d 180.

The Court of Appeal affirmed the order, but stayed its effective date until entry of final judgment in the case. It held that appending the new ordinance to the motion for summary relief was tantamount of amending the complaint for enforcement of the old ordinance, which would have sufficed to cure the pleading defects. Slip Opinion 17, infra.

The Court of Appeal further held that petitioners "waived" the state law which prohibits abatement when they failed to call it to the attention of the trial court before the hearing. Slip Opinion 11.

The federal question were raised below.

When the City argued, on appeal, that the removal order was proper because the ordinance was a proper exercise of police power, petitioners responded that the issue was not police power but due process, which required a showing of compliance with the procedural steps specified by the new ordin-

ance as conditions precedent to enforcement. Appellants' Closing Brief 14-15.

The Court of Appeal did not address that issue.

In their petition for rehearing, petitioners pointed out that whether attaching the new ordinance to the motion for summary relief did or didn't constitute an amendment of the complaint was immaterial because a complaint to enforce an unconstitutional ordinance cannot be amended or supplemented to state a good cause of action; that the new ordinance did not and could not rejuvenate the previous ordinance so as to make it enforceable; and that the new ordinance could not be enforced in the absence of pleading and proof that its own procedural requirements had been met. They pointed out that enforcing the new ordinance on a showing of violation of the old ordinance (i.e., failure to conform within 180 days after written notice of violation) would be to give the new ordinance ex post facto effect. PR 14-15.

When the Court of Appeal denied rehearing, petitioners reiterated and expanded those same arguments in their Petition for Review (p. 9) by the California Supreme Court, which denied the petition.

On the second question presented here, concerning "waiver" of substantive law, petitioners argued in their brief to the Court of Appeal, in their petition for rehearing, and in their petition for review that when a trial court fails or refuses to apply governing law to the facts before it that is fundamental error, regardless of how or why it occurs. Unless invited, such error is subject attack on appeal. They pointed out that the judicial function, i.e., finding the facts and then applying the law, cannot be delegated to the parties, thus the failure of a party to "remind" the court of controlling law can not operate as a waiver of substantive law. Appellants' Opening Brief 21-22; Petition for Rehearing 8-11; Petition for Review 14-15.

The state court action is final.

Since the mandatory injunction requiring removal of petitioners' sign has been stayed until entry of final judgment, the Court's first inquiry will be whether state action is final insofar as the questions here presented are concerned. Peitioners submit that it is.

While it is true that the present opinion of the Court of Appeal does not terminate this case, the affirmance of the removal order is now final, i.e., it is not subject to further review or attack in the state courts. The effect of the order is "final" in the practical sense of that term. Eisen v. Carlyle & Jacquelin 417 US 156, 171-172.

This Court thoroughly examined the entire question of finality for purposes of determining jurisdiction in Cox Broadcasting Corporation v. Cohn 95 S Ct 1029. Petitioners respectfully submitt that the instant case falls within both the first and second cata-

gories discussed there. 95 S Ct at 1038-1039.[2/]

The Court of Appeal did not treat the order as temporary or preliminary, but as a permanent injuction, and held that it had been properly determined in the summary proceedings but improperly given immediate effect. Slip op. p. 1. Consequently, no further discretionary action by the trial court was contemplated by the appellate opinion. Cox makes it clear that in such instance the state action is "final."

WHY THE WRIT SHOULD ISSUE

1. The permissible methods of salvaging laws ruled unconstitutional, and by whom it may be done, merit the attention of this Court.

Petitioners recognize that when this

2/ Petitioners apologize for switching back and forth in citing the opinions of this Court. The local law library is a hodge-podge of odds and ends of all three reports, and the one needed always seems to be lost, strayed or stolen.

Court declares certain features of a law to be unconstitutional, it has neither the time nor the facilities to police the manner in which the state responds to that edict. But is is clear that basic guidelines are needed, and that only this Court can draw them.

Metromedia presents an illuminating example of the problem addressed here. That case was sent back to California for determination of whether the San Diego sign ordinance could be conformed to constitutional requirements by simply excising its objectionable features, thus permitting the prosecution of a violation of its unoffending provisions to continue. The California Supreme Court ruled that it couldn't be done. Metromedia, Inc. v. City of San Diego (1982) 32 Cal.3d a80.

The query posed by petitioners here is whether the San Diego City Council could have then undertaken to accomplish what the court had said couldn't be done, i.e., cure the defective ordinance by re-enacting it ver-

batim except for the vitiating provisions, and then proceeding with the prosecution?

The court below has tacitly approved such legislative action by permitting the City to proceed with this prosecution.[3/] The issue is whether that procedure comports with due process or impermissibly gives ex post facto effect to an entirely new and different law.

The critical significance of that determination lies in its impact on the City's failure to give the required notice of claimed violation of the new ordinance. That omission was fatal unless it can be said that the new ordinance cured the debilitating defects in the old ordinance and thereby rehabilitated the prosecution for violating it.

3/ Petitioners do not imply any direct connection between this case and Metromedia. But when certain provisions of a law before this Court are held to be unconstitutional, every law in this land with similar provisions is affected in the same manner and to the same extent as though it, too, had been under review. In that sense, the sign ordinance here was invalidated by Metromedia, and the options of the Santa Barbara City Council were identical to those of San Diego.

2. Circumvention of the rulings of this Court should not be condoned or ignored.

Regardless of why or how it came about, the upshot of this case is that an ordinance that was unenforceableleable under a standard set by this Court has been enforced.

What is accomplished by declaring a law unconstitutional, and thus unenforceable, if the state can pay mere lip service to that ruling and quietly go about enforcing the law as though this Court had never spoken?

Petitioners have no illusions that the Court has the slightest interest in whether an old landmark sign 3,000 miles away is or isn't removed. But the Court should be interested in guarding its prerogative and duty to ensure that the laws governing the people of this land conform to constitutional standards. How can the Court discharge that duty if its edicts get no more than a wink and a nod while the state carries on business as usual?

It seems evident that the mere striking down of a law as unconstitutional is not enough. Admittedly, the Court could never undertake wholesale surveillance of whether and how its decisions are implemented, but it might be helpful if the Court voiced its views when confronted with concrete proof that its pronouncements are being disregarded.

Concededly, the problem is exacerbated in California by the rule that opinions of the intermediate appellate courts are not published unless the court orders it. Novel theories and preposterous concepts can flourish here in almost total darkness. Much could be said about whether that practice comports with the rationale of the mandate for public trials, but that argument must await another case on another day.

Although the Court cannot oversee every dereliction of state duty, it could give notice here that it is not oblivious to what goes on behind its back, and disapproves it.

3. The proposition that substantive law can be "waived" should be quashed as inimical to the right to a fair trial.

The trial court here refused to consider applicable law explicitly designed to protect petitioners' property from arbitrary removal, giving as a reason the failure of petitioners to cite that law before the day of the hearing. The Court of Appeal approved that view, on the ground that petitioners "waived" the law by not apprising the trial court of it two weeks before the hearing.

That is a pernicious theory. If extended to criminal law (and why couldn't it be?), an individual could be sentenced to 20 years in state prison for stealing a quarter candy bar if he didn't know the difference between grand and petty theft and/or failed to explain the law to the judge.

Procedural law can be waived by not taking proper action at the proper time, but there is no precedent for the notion that

substantive law does not apply to those who are unaware of it, or fail to educate the judge on the subject. Judges are expected to know the law, or know where to find it, and apply it correctly to the facts before them. That duty cannot be delegated to the parties or their attorneys, and if the court errs in its construction of the law, that decision is subject to attack on appeal, irrespective of whether the parties knew or mentioned the correct law.

Imposing such a duty on petitioners deprived them of a fair trial.

Wherefore, petitioners pray that the Court issue a writ of certiorari and review the opinion below for fundamental error.

Respectfully submitted,

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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT - DIVISION SIX

CITY OF SANTA BARBARA, Plaintiff and Respondent, v. EMIL F. DeLORETA and JAMES M. DeLORETO, Defendants and Appellants.	2nd Civil No. B009498 Superior Court No. 140566 Santa Barbara County COURT OF APPEAL FILED April 3, 1986 Clay Robbins, Jr. Clerk

The DeLoretos appeal a summary adjudication of certain issues in favor of the City of Santa Barbara (City) and an order requiring the removal of the DeLoretos' central, on-site commercial pole sign in Loreto Plaza. Although this mandatory injunctive order is appealable (Code Civ. Proc. §904.1, subd. (f), and we find the evidence supports the summary adjudication of the issues upon which it is based, we must order the execution of the injunction stayed pending a final judgment on all the issues between the parties to this appeal. (Niederer v. Ferreira (1983) 150 Cal.App.3d 219, 222-224; Olson v. Cory (1983) 35 Cal.3d 390, 398-399.)

Our decision is based upon the one final judgment rule as applied in partial summary judgment cases and our conclusion that the limited exceptions to this rule are not applicable here.(DeGrandchamp v. Texaco, Inc. (1979) 100 Cal.App.3d 424, 430-431; Trani v. R.G. Hohman Enterprises, Inc. (1975) 52 Cal.App.3d 314, 315-316; Neiderer v. Ferreira, supra, 150 Cal.App.3d at pp. 222-224.) Nevertheless, since the appeal of the mandatory injunctive order is properly before us, we consider the issues pertinent to that order.

FACTS

In October 1975 the Santa Barbara City Council adopted an amendment to its existing sign ordinance prohibiting the construction of "pole signs" and requiring the removal of all non-exempt existing pole signs under a five-year amortization period. A "ple sign" is defined by the City Municipal Code as "[a] sign erected on one (1) or more uprights supported from the ground, the height of which is greater than six (6) feet above grade at the edge of

the public right-of-way, and which is not part of any building or structure other than a structure erected solely for the purpose of supporting a sign."

In November 1980 the City Council again amended the sign ordinance to reflect an absolute prohibition on pole signs, without further amortization. The ordinance required removal of signs by March 17, 1981. Another amendment, adopted in May 1981, provided a 180-day written notice provision to inform sign owners of the removal requirement and the end of amortization.

City's First Motion

On April 2, 1982 the City filed and served a complaint and summons for injunctive relief and penalties for violation of the sign ordinance against the DeLoretos and others. In particular, the complaint sought permanent injunctive relief to compel the removal of various signs in Loreto Plaza prohibited by the ordinance.

In March 1983 the City filed its first motion for partial summary judgment. The DeLoretos successfully challenged that motion on

First Amendment constitutional grounds because the ordinance was facially overbroad in its restriction on signs. They argued that local ordinances regulating signs must distinguish between commercial and non-commercial speech. Although there is latitude in prohibiting on-site commercial signs, non-commercial signs must be accorded greater protection. Metromedia, Inc. v. San Diego (1981) 453 US 490, 512, 514-515; Metromedia, Inc. v. City of San Diego (1982) 32 Cal.3d 180.

The trial court agreed and ruled that the ordinance suffered from this constitutional defect, even though the court felt the evidence supported the motion. In light of the Metromedia cases, the trial court denied the motion without prejudice to renew it and indicated the need to confine the prohibition to commercial signs in accordance with Metromedia, Inc. v. San Diego, supra, 453 US 490.

In March 1984 the City Council adopted an amendment to its ordinance to rectify the constitutional deficiency. This sign ordinance,

like its predecessor, expressly stated its purpose was to protect and enhance the scenic beauty of Santa Barbara with a view towards attracting tourists and commerce. The ordinance also makes nonconforming signs, including pole signs, unlawful and subject to abatement and penalties. We take judicial notice of Santa Barbara Municipal Code section 1.18.040, which is applicable to the ordinance in question. It declares violations of the Code to be public nuisances which may be summarily abated. (Evid. Code §452, subd. (b).)

City's Second Motion

In July 1984 the City again filed and served a motion for summary adjudication of issues, pursuant to Code of Civ. Proc. §437c, subd. (f). The DeLoretos filed and served "opposition" in mid-August 1984, mainly requesting a continuance to complete administrative proceedings in the case. The hearing on the motion was postponed pending those administrative proceedings on the factual issues in the case. It is undisputed that the DeLoretos

pursued and exhausted all their administrative remedies before the hearing on this motion on October 19, 1984.

A few days before the hearing, the City filed and served by mail a supplemental memorandum devoted to an analysis of IT Corporation v. County of Imperial (1983) 35 Cal.3d 63, discussed infra. The DeLoretos apparently received this memorandum the next day, October 17, 1984, and prepared a "response" regarding various Business and Professions Code sections, which they personally served on the City the day before the hearing and filed the day of the hearing. It is the only other "opposition" the DeLoretos filed to the motion at issue.

The trial court found the following five adjudicated issues to be without substantial controversy, to wit, that:

1. Pole signs are prohibited in the City of Santa Barbara pursuant to Santa Barbara Municipal Code §22.70.030;

2. The DeLoretos own Loreto Plaza, which is within the City of Santa Barbara;

3. The DeLoretos own and assume full responsibility for the pole sign and pole sign structures on the property known as Loreto Plaza;

4. A double upright pole sign reading "Loreto Plaza" exists on the property known as Loreto Plaza; and

5. The DeLoretos have failed to remove the double upright pole sign reading Loreto Plaza.

On October 25, 1984 the trial judge ordered these issues be deemed established in favor of the City and against the DeLoretos at trial or on final disposition of the action by the court. The judge also ordered the DeLoretos to remove the double upright pole sign reading "Loreto Plaza" within 15 days of service of the order.

Proof of service shows the order was served on the same day, October 25, 1984. This appeal ensued upon timely notice of appeal.

DISCUSSION

I

Jurisdiction

This appeal lies due to the mandatory

order of the trial judge to remove the pole sign with 15 days of his order. (C. Civ. Proc. §904.1, subd. (f).) Execution of that order must be stayed, however. The order was based upon a summary adjudication of only five issues in this case. Additional issues concerning other signs on the DeLoretos' property remain unresolved. Other structures and signs include (1) a one-hour parking/tow-away sign, (2) a "road closed" sing, (3) two "no public parking-tow away signs, and (4) two other poles from a Chevron gas station. Although the extensive changes in the summary judgment statute authorize and encourage summary disposition of issues, we must distinguish between judgments determinative of an entire cause of action and those which determine some, but not all, of the issues which may be necessary to the disposition of a cause of action. (Beech Aircraft Corp. v. Superior Court (1976) 61 Cal.App.3d 501, 517.

The summary adjudication of the fice issues brought before the trial court is well substantiated by admissions of the DeLoretos and other competent evidence and may otherwise

support the removal order. (Cory v. Golden State Bank (1979) 95 Cal.App.3d 360, 366.) But, since none of the exceptions to the one final judgment rule in partial summary judgment cases applies to this case, the execution of the sign removal order must await the resolution of the unresolved issues. (DeGrandchamp v. Texaco, Inc., supra, 100 Cal.App.3d 424.)

Under the DeGrandchamp case, there are three basic exceptions to the one final judgment rule. They are: (1) where the partial summary judgment disposes of all issues to be determined as to one party, (2) where other causes of action a a suit and separate and distinct (i.e., severable) from the one in which the partial summary judgment is rendered, and (3) where all the issues necessary to a disposition of the remaining causes of action have been decided by the trial court or can be decided by the trial court as a matter of law on the basis of the record already before the court. (DeGrandchamp v. Texaco, Inc., supra, 100 Cal.App.3d 424, 431-435.)

In addition, "... a separate judgment may properly be awarded in the action ..." (C. Civ. Proc. §437c, subd. (j)) upon discretionary review as a matter of appellate policy in egregious cases, even where such an order or judgment does not dispose of the entire case. (DeGrandchanp v. Texaco, Inc., supra, 100 Cal.App. 3d at p. 436.) Since this case involves a single cause of action with unresolved issues remaining, none of the exceptions to the final judgment rule apply. (Id., at p. 431.) We now turn to the injunctive order for removal of the sing.

II

Untimely Opposition to the City's Second Motion

The court would not consider the DeLoretos' points and authorities filed on October 19, 1984, the date of the hearing. In those points and authorities the DeLoretos desired to argue the applicability of certain Business and Professions Code sections in existence since September 1983. The DeLoretos dilatory points and authorities did not consider the City's contentions regarding

the IT case, supra. But, the DeLoretos claim they had no notice of the relief sought by the City until the last moment; hence, the last minute reliance on the Business and Professions Code sections.

As the City states in its opening brief, the DeLoretos had notice of what the City had been seeking for years. Letters from the City to the DeLoretos concerning removal of signs date back to 1981. The pleadings provide notice, too. Proof of personal service of the latest motion indicates service on July 20, 1984. The court properly used its discretion to consider the DeLoretos' arguments untimely. (C. Civ. Proc. §§187, 437c, subd. (b).) The DeLoretos' arguments concerning the Business and Professions Code §§5490-5499 are deemed waived as a matter of law. "Any opposition to the motion shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise." (C. Civ. Proc. §437c (b).)

III

The Injunctive Order to Remove the Sign

"The law is well settled that the decision to grant a preliminary injunction rests is the sound discretion of the trial court." IT Corp. v. County of Imperial, supra, 35 Cal.3d 63, 69. The order of the trial court cannot be reversed absent an abuse of discretion. Ibid. Since the trial court did not abuse its discretion, we affirm the order to remove the sign but stay its execution since the judgment upon which it it based lacks finality.

The DeLoretos argue that the City did not give them notice that permanent injunctive relief was sought and might be forthcoming in the event the court granted the partial summary judgment. The first sentence of the introduction to the City's points and authorities alerted the DeLoretos to the relief sought. The prayer in the complaint alerted the DeLoretos to the relief sought. Moreover, a court may afford any form of relief supported by the evidence as to which the parties were on

notice, whether requested in the pleadings or not. American Motorists Ins. Co. v. Cowan (1982) 127 Cal.App.3d 875, 883.

IV

Requisites for Injunctive Relief

The DeLoretos assert that the traditional two-pronged test announced in Continental Baking Co. v. Katz (1968) 68 Cal.2d 512, 528, is applicable to the instant case and requires reversal. That test involves the balancing of equities as to injury and hardship to the parties and determining the probability of a party ultimately succeeding on the merits of the case. Ibid. But, the development of the law relating to injunctions establishes that this traditional test is no longer applied in the instant situation. The rules in injunction cases differ depending upon the circumstances.

In People er rel. Dept. Pullic Wks. v. Adco Advertisers (1973) 35 Cal.App.3d 507 the court stated, "[a] legislatively declared public nuisance constitutes a nuisance per se against which an injunction may issue without

allegation or proof of irreparable injury." id. at 511. That case involved a complaint for injunctive relief to compel the removal of an advertising billboard owned by a private corporation in contravention to a state statute. p. 509. The controlling facts were undisputed, and the trial court entered summary judgment for the state. Ibid. The establishment of the controlling facts was tantamount to finding the billboard a public nuisance as a matter of law. p. 511. And, the proper remedy against a public nuisance is its abatement. id. at 512; accord: City Council v. Taxpayers for Vincent (1984) ___ US ___, 80 L.Ed.2d 772, 787, 104 S Ct ___.

The DeLoretos concede that the Supreme Court in the IT case elucidated a standard in zoning cases (similar to those just discussed) which differs for the traditional Katz approach. IT Corp. v. County of Imperial, supra, 35 Cal. 3d 63.

The IT case concerned a conditional use permit for the storage of hazardous wastes. The Supreme Court determined that traditional

tests for injunctive relief should not apply to governmental entitles alleging a violation of a zoning ordinance. id. at 70-73.

The IT court explained that once the trial court determines the governmental entity will probably succeed at trial in proving the violation of statute, the court is justified in presuming public harm since the legislative boday has already passed the enactment declaring the activity contrary to the public interest. id. at 70.

Where the ordinance calls for injunctive relief, it is a legislative determination that significant public harm would result from the use, and injunctive relief may be most appropriate. id. at 70-71.

The reasonable probability of prevailing is sufficient to establish a rebuttable presumption of public harm. id. at 73, fn. 6. Only when the opposing party shows grave, irreparable harm would the presumption stand rebutted. pp. 71-72. But, the clearer the violation, the less balancing the court needs to do, even after

the presumption stage. p. 72, fn. 5. In fact, no hard rule exists on whether the court need ever accord as much weight to potential harm. pp. 72-73.

If the court believes it is "fairly clear" the government will prevail, the trial court may legitimately decide that an injunction should issue, even though the government would lose in a balancing contest. id. at 72-73. We find the trial court properly exercised its discretion in issuing the injunctive order. It is fairly clear the City will ultimately prevail. But, the stay is necessary since other issues remain to be decided.

V

The "Taking" - Does it Require Compensation

Although the DeLoretos do not challenge the City's amortization period, they claim there is a taking without just compensation. The sign in question is 23 years old. Where signs are fully depreciated, as is the case here, no amortization or compensation is necessary. Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 883-884 - overruled in part on other

grounds (1981) 453 US 490; see United Business Com. v. City of San Diego (1979) 91 Cal.App.3d 156, 180. Even where the sign is not fully amortized, a one to four year amortization period is proper. Ibid. We note that is has been about one and a half years since the last motion was filed and served (and close to two years since the March 1984 ordinance became effective). The Legislature may declare a pre-existing use a public nuisance, as here, and forbid the use without any amortization period whatsoever. People ex rel. Dept. Pub. Wks. v. Adco Advertisers, supra, 35 Cal.App.3d at 512-513.

VI

An Amended Complaint

We treat the attachment of the amended ordinance to the second motion for summary adjudication of issues as equivalent to the filing of an amended complaint. The proper filing of an amended complaint would have consisted of merely incorporating by reference the amended ordinance to the complaint on file. This, in effect, is what occurred. "No particular point

would be gained by rewriting [the] complaint. It was perfectly obvious to court and counsel what was before the court. Ogier v. Pacific Oil & Gas Etc. Corp. (1955) 132 Cal.App.2d 304, 308. The DeLoretos had notice of the relief sought; they suffered no prejudice. Bixbom v. Smith (1944) 23 Cal.2d 535, 543.

The judgment for summary adjudication of issues is affirmed, and the injunctive order stayed pending resolution of the remaining issues between these parties.

NOT TO BE PUBLISHED.

Gilbert, J.

We concur:

STONE, P.J.

ABBE, J.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CITY OF SANTA BARBARA, etc.,	2d Civil B009498
	Super Ct. 140566
Plaintiff and Respondent,	Santa Barbara Co.
v.	Court of Appeal
EMIL F. DeLORETO and JAMES M. DeLORETO,	FILED
	May 1, 1986
Defendants and Appellants.	Clay Robbins, Jr.
	CLERK

THE COURT:

It is ordered that the opinion filed herein on April 3, 1986, be modified in the following particular:

On page 17, add a final sentence to the last paragraph:

Each party to bear its own cost on appeal.

The petitions for rehearing are denied.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 6, No. Boo9498

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CITY OF SANTA BARBARA, etc., Respondent

v.

DE LORETO et al., Appellants

Appellants' petition for review DENIED

BIRD

Chief Justice

SUPREME COURT

FILED

JUL 9 1986

Lawrence P. Gill, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

EMIL F. DeLORETO and
JAMES M. DeLORETO,

Petitioners,

-vs-

CITY OF SANTA BARBARA,

Respondent.

Certificate of Service

I hereby cerify that on November 11, 1986 three copies of the within Petition were mailed to Steven Amerikaner, City Attorney, City Hall, Santa Barbara, CA 93101, postage prepaid.

I further certify that all parties required to be served have been served.

Richard E. Rader
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